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Office of Administrative Law Judges
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Issue date: 10Apr2001

CASE NO.: 1999-BLA-00849

In the Matter of

ERNESTINE BAILEY (WIDOW OF VIRGIL BAILEY)
Claimant

v.

HARMAN MINING COMPANY
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Vincent J, Carroll, Esquire, Richlands, Virginia, for the Claimant

Lucy G. Williams, Esquire (Street, Street, Street, Scott and Bowman), Grundy, Virginia, for the Employer

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER ON REQUESTS FOR MODIFICATION DENYING LIVING MINER'S AND SURVIVOR'S BENEFITS

I. Statement of the Case

This case is before me pursuant to a request for hearing filed by Ernestine Bailey (the Claimant) in connection with claims for benefits against the Harman Mining Company (the Employer) under the

provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act), and the regulations issued thereunder which are found at 20 C.F.R. Ch. VI, Subch. B (the Regulations). The Act provides for the payment of benefits to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, and to the survivors of a coal miner whose death is due to pneumoconiosis. 30 U.S.C. §901(a). Pneumoconiosis, commonly known as black lung, is a chronic disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. §902(b). The Regulations provide that any party to a claim under the Act has a right to a hearing on any contested issue of fact or law that is not resolved through informal administrative proceedings. 20 C.F.R. §725.450.

The case began nearly 25 years ago when the Claimant's husband, Virgil Bailey (the Miner), filed a claim for benefits under the Act on May 13, 1976. Director's Exhibit No. 1.[1] The Office of Workers' Compensation Programs (OWCP) denied the claim, and the Miner requested a hearing before the Office of Administrative Law Judges (OALJ). Administrative Law Judge (ALJ) Howard J. Schellenberg issued a Decision and Order denying the claim on February 5, 1981. DX 41. Judge Schellenberg found that the record did not support the Miner's allegation that the medical evidence of record triggered any of the statutory presumptions of entitlement under 20 C.F.R. §727.203. Upon the Miner's appeal, the Benefits Review Board (the Board) affirmed Judge Schellenberg's denial of benefits in a Decision and Order dated January 11, 1984. DX 54. The Miner then appealed to the United States Court of Appeals for the Fourth Circuit which affirmed the Board's decision by Order dated April 22, 1986. DX 57.

On November 24,1986, within one year of the Fourth Circuit's Order, the Miner filed a timely request for modification of the denial of his claim pursuant to the modification provisions at 20 C.F.R. §725.310.[2] DX 61. On May 19, 1989, ALJ Ben L. O'Brien issued a Decision and Order denying the Miner's modification request based upon his finding that there had been no material change in conditions or mistake in a determination of fact in the prior denial. DX 102. The Miner appealed this denial to the Board and simultaneously filed another claim with the OWCP, indicating his dissatisfaction with Judge O'Brien's decision. The OWCP referred the new claim to Judge O'Brien for a

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[1] The documentary evidence in this record is designated as "DX" for exhibits offered by the Director, OWCP, "CX" for exhibits offered by the Claimant, "EX" for exhibits offered by the Employer, and "ALJX" for exhibits offered by the Administrative Law Judge. References to the hearing transcript will be designated "TR".

[2] Section 725.310(a) provides that the Deputy Commissioner (now District Director) may, upon his or her initiative or at the request of a party, reconsider the terms of an award or denial of benefits on grounds of a change in conditions or because of a mistake in a determination of fact at any time before one year from the date of last payment of benefits or before one year after the date of a denial.

determination as to whether the Miner's statement of dissatisfaction with the prior decision constituted a motion for reconsideration, and the Board dismissed the Miner's appeal as premature and remanded the first claim to OALJ for formal action on the Miner's new claim and motion for reconsideration of the denial of his first claim. DX 121. On remand, the matter was transferred to ALJ Richard K. Malamphy as Judge O'Brien was no longer available. Judge Malamphy issued a Decision and Order on Remand on July 8, 1994, denying the Miner's motion for reconsideration and affirming Judge O'Brien's finding that the evidence did not support the Miner's allegations that there was a mistake of fact in the denial of his first claim or that there had been a change in conditions since the prior denial. DX 122. On appeal, the Board affirmed Judge Malamphy's decision in a Decision and Order issued on January 30, 1995. DX 123, 131. The Miner appealed further to the United States Court of Appeals for the Fourth Circuit which affirmed the Board's decision on May 19, 1995. DX 132, 137.

The Miner filed a new request for modification on June 14, 1995. DX 138. After the OWCP administratively denied this request on December 5, 1995, DX 140, the Miner requested a hearing. On May 27, 1997, ALJ Donald B. Jarvis issued a Decision and Order denying modification, finding that the more recent objective test results and medical opinion evidence provided by the Miner's physician did not invoke the presumption of entitlement under 20 C.F.R. §727.203. DX 161. Upon appeal, the Board affirmed Judge Jarvis's decision denying modification in a Decision and Order dated June 9, 1998. DX 168.

The Miner passed away on April 24, 1997. DX 174. On October 1, 1997, while the Miner's appeal of ALJ Jarvis's decision was pending before the Board, the Claimant filed a claim for survivor's benefits as the Miner's widow. DX 169. The OWCP denied her survivor's claim on March 20, 1998. DX 183. On November 6, 1998, the Claimant's attorney filed requests for "remodification" of both the OWCP's March 26, 1998 denial of the survivor's claim and the Board's June 19, 1998 denial of the Miner's request for modification of the prior denial of his claim. DX 186. After the OWCP denied modification her modification requests on January 6, 1999, DX 189, 190, the Claimant filed a timely request on January 14, 1999 for a formal hearing. DX 191. The OWCP then referred both claims to OALJ on April 28, 1999. DX 196, 197.

Upon referral to OALJ, the matter was assigned to ALJ John C. Holmes who issued a notice of hearing for September 16, 1999 in Abingdon, Virginia. At the Claimant's request, Judge Holmes continued the hearing, and the matter was reassigned to me and rescheduled to February 8, 2000 at which time all parties were afforded full opportunity to present evidence and argument. Appearances were made at the hearing on behalf of the Claimant, the Employer and its insurance carrier, Underwriters Safety and Claims (the Carrier). No appearance was made by the Director, OWCP. The parties at the hearing waived presentation of testimony, and Director's Exhibits 1-185 and 187-197 were admitted without objection pursuant to 20 C.F.R. §725.456(a). The Employer objected to the admission of the Director's Exhibit 186, which contained an October 21, 1998 consultative report and autopsy slide review by Dr. Miles Jones submitted by the Claimant in support of her modification requests, on the basis that inclusion of this evidence would violate Employer's right to

due process because the autopsy slides had apparently been lost and were unavailable for examination by experts of the Employer's choosing. The Employer and Carrier also moved to be dismissed as parties, arguing that any liability should be assigned to the Black Lung Disability Trust Fund because the OWCP had lost the autopsy slides and, thereby, unfairly prevented the Employer from adequately defending this claim. At the close of the hearing, I took the Employer's objection to Dr. Jones's report and the motion to dismiss under advisement, and I informed the parties that I would issue an order to show cause, allowing the Director an opportunity to respond to the Employer's motion to be dismissed. I also deferred ruling on the admission of Employer's Exhibits EX 1-5 pending a ruling the Employer's motion to be dismissed.

On February 14, 2000, I issued an order that the Director show cause why the Employer should not be dismissed on the grounds that its due process rights had been violated. By letter dated February 29, 2000, the Director responded to the order to show cause, opposing dismissal of the Employer. Citing *Lewis v. Consolidation Coal Co.*, 15 BLR 1-37 (1991) (*Lewis*), the Director argued that the Employer's right to cross-examine adverse party evidence was not violated by the loss of the autopsy slides because the Employer could have cross-examined Dr. Jones at a deposition. On March 14, 2000, I issued an order denying the Employer's motions as I concurred with the Director that the Employer's due process rights were adequately protected by the opportunity to cross-examine Dr. Jones at a deposition. Consequently, I admitted Dr. Jones's report as DX 186 and Employer's Exhibits EX 1-5. Noting that the Employer had not previously sought to take Dr. Jones's deposition, I granted the Employer an additional 45 days to depose Dr. Jones and submit the deposition transcript.

After the March 14, 2000 order was issued, a letter dated March 14, 2000 was received from counsel to the Employer who advised that efforts to secure the autopsy slides from the District Director's office had been unsuccessful.[3] In this letter, counsel also disputed the Director's assertion that the Employer's due process rights had not been violated, and it argued that the facts in *Lewis* case relied on by the Director were distinguishable. By order issued on May 8, 2000, I treated this letter as a motion for reconsideration which I denied based on my finding that neither the factual differences between the instant matter and Lewis nor the new information indicating that the District Director's office was responsible for the loss of the autopsy slides was material to the question of whether the Employer had been deprived of due process. I reaffirmed the rulings in the March 14, 2000 order and allowed the Employer ten days to file notice of whether it intended to take Dr. Jones's deposition. Counsel to the Employer responded in a letter dated May 16, 2000 that she had been unable to contact Dr. Jones, and she requested the Court's assistance. The requested assistance was provided in an order which I issued on May 30, 2000, finding that the Claimant, as the party offering the report from Dr. Jones, must bear responsibility for providing opposing counsel with a current and accurate address and phone number for the doctor and directing that the Claimant provide same to the Employer within

[3] The Claimant's attorney had previously written to the court that the autopsy slides had been returned to the office of the District Director after they had been reviewed by Dr. Jones.

ten days. The Court subsequently received copies of correspondence dated June 21, 2000 and June 30, 2000 which reflected the Employer's efforts to contact Dr. Jones; however, no further correspondence or motions were received, and no deposition transcript was ever offered. By orders issued on November 15, 2000 and December 4, 2000, the parties were directed to report on the status of post-hearing evidentiary development and whether the record could be closed. The Employer responded by letter dated November 28, 2000 that all efforts to contact Dr. Jones by phone and certified mail for purposes of scheduling his deposition had proved fruitless. Accordingly, the Employer renewed its motions to be dismissed and, in the alternative, to exclude the report from Dr. Jones because neither Dr. Jones nor the autopsy slides could be located. The Claimant responded in a letter dated December 15, 2000 that no further evidence would be submitted. On December 22, 2000, I issued an order closing record and allowing the parties until January 22, 2001 to submit closing argument. The parties were also advised by this order that the Employer's renewed motions were taken under advisement and would be addressed in my decision and order on the merits. Within the time allowed, the Employer submitted a closing argument.

Complicating matters further, the Department of Labor's Employment Standards Administration published Final Rules on December 20, 2000 amending the Black Lung Regulations effective January 19, 2001. 65 Fed. Reg. 79920-80107 (Dec. 20, 2000). The National Mining Association (NMA) challenged the amended regulations and filed a motion in U.S. District Court for the District of Columbia, seeking to enjoin implementation of 47 sections of the amended rules. On February 9, 2001, the District Court issued a Preliminary Injunction Order granting the NMA limited injunctive relief including a stay of adjudication of any claims pending before the Office of Administrative Law Judges except where the adjudicator, after briefing by the parties to the pending claim, determines that the regulations at issue will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV-3086 (EGS) (D. D.C. Feb. 9, 2001). Regarding such claims, the Court ordered,

> All claims for black lung benefits pending before the Department's Office of Administrative Law Judges at the time of this Order or which become pending within the period set by the Court for briefing, hearing and decision on the merits, shall be stayed for the duration of the briefing, hearing and decision schedule set by the Court, except where the adjudicator, after briefing by the parties to the pending claim, determines that the regulations at issue in the instant lawsuit will not affect the outcome of the case.

Preliminary Injunction Order at ¶3. On February 22, 2001, I issued an order directing the parties to file briefs stating with specificity their positions on how application of the amended rules would affect the outcome of this case. Timely briefs were received from both the Employer and the Director. The Director contends that new rules will not affect the outcome of the case because they do not materially change the standards for determining a coal miner's total disability or death due to pneumoconiosis which would be applicable to this case in the absence of the new regulations. The Employer on the

other hand alleges that the new rules are unsupported by the rule making record, arbitrary, capricious and without scientific justification, and it asserts that several of the new rules are directly implicated in the instant litigation. Based on these contentions, the Employer moves that adjudication of this matter be held in abeyance pending a decision by the District Court on the NMA's action for declaratory and injunctive relief. The Claimant also filed a brief on April 2, 2001, after the date set in the February 22, 2001 order, contending that application of the new rules will strengthen her position because they refine and add detail to the existing law.

After careful consideration of the briefs submitted by the parties, I have concluded that application of the new rules will not affect the outcome of the case and that adjudication on the merits is permissible under the Preliminary Injunction Order. On the merits, I will deny the Employer's motion to be dismissed, but I will grant its motion to exclude the report from Dr. Jones on due process grounds. Finally, I have concluded that the Claimant's requests for modification of the prior denials of the Miner's claim and her claim for survivor's benefits must be denied as the record does not establish that there was a mistake in any prior determination of fact. My findings of fact and conclusions of law are set forth below.

II. Findings of Fact and Conclusions of Law

A. Application of the New Rules

The Employer contends that the following new rules are directly implicated in this case: (1) 20 C.F.R. §718.104(d); (2) 20 C.F.R. §718.201(a)(2); (3) 20 C.F.R. §718.201(c); (4) 20 C.F.R. §718.204(a); (5) 20 C.F.R. §718.205(c)(5); and (6) 20 C.F.R. §718.205(d).

1. 20 C.F.R. §718.104(d) (Treating Physician Opinions)

This new provision addresses the weight to be given to an opinion from a miner's treating physician. As the Director correctly points out in its brief, the new section 718.104(d) only applies to evidence developed after the January 19, 2001 effective date of the amended regulations. 65 Fed. Reg. 79933 (December 20, 2000). Since there is no medical evidence in this record that was developed after January 19, 2001, I find, in agreement with the Director, that the new section 718.104(d) can have no impact on the outcome of this case.

2. 20 C.F.R. §718.201(a)(2) (Legal Pneumoconiosis)

The new section 718.201(a)(2) sets forth the following definition of legal pneumoconiosis:

> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited

to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

The Employer contends that the new provision invents a new "regulatory condition" called "legal pneumoconiosis" and creates a "burden shifting presumption" which may provide benefits for respiratory disability without regard to the cause. While this new rule does set forth a definition of "legal pneumoconiosis" that is different from the definition found in the old regulations, it plainly does not create any "burden shifting presumption" or authorize an award of benefits for any respiratory disability without regard to cause. Rather, the new section's definition of legal pneumoconiosis is specifically confined to diseases and impairments "arising out of coal mine employment." Moreover, as the Director asserts, the new definition merely reflects well-established precedent in the Fourth Circuit, where this case arises, recognizing that disability resulting from both "clinical" and "legal" pneumoconiosis may be compensable under the Act and that obstructive as well as restrictive lung disease may qualify as pneumoconiosis if they arise from coal mine employment. *See Gulf & Western Industries v. Ling*, 176 F.3d 226, 231-232 (4th Cir. 1999) ("clearly, the condition known as 'pneumoconiosis' that Congress has determined compensable is considerably more wide-ranging than mere clinical pneumoconiosis."); *Clinchfield Coal v. Fuller*, 180 F.3d 622, 625 (4th Cir. 1999) (the legal definition of pneumoconiosis "encompasses a wide variety of conditions; among those are diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary symptomatology have nevertheless been made worse by coal dust exposure."); *Richardson v. Director, OWCP*, 94 F.3d 164, 166 n.2 (4th Cir. 1996) (COPD, if it arises out of coal mine employment, clearly is encompassed within the legal definition of pneumoconiosis, even though it is a disease apart from clinical pneumoconiosis."); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 175 (4th Cir. 1995) ("Chronic obstructive lung disease . . . is encompassed within the definition of pneumoconiosis for purposes of entitlement to Black Lung benefits."). As the new section 718.201(a)(2) is fully consistent with controlling precedent in the Fourth Circuit, I find it will not affect the outcome of this case.

3. 20 C.F.R. §718.201(c) (Latent and Progressive Disease)

This new section states "For purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." The Employer attacks this amendment to the definition of pneumoconiosis as a burden shifting presumption, and it states without elaboration or specificity that the "proposed record in this case suggests that latency and progression may be issues, and as a consequence 20 C.F.R. §718.201(c) is directly implicated in this litigation." The Director responds that, like section 718.201(a)(2), the new section 718.201(c) merely tracks Fourth Circuit precedent. The Supreme Court and Fourth Circuit have recognized that pneumoconiosis is a progressive and irreversible disease. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 151 (1987) (describing the etiology of pneumoconiosis as "progressive and irreversible"), *rehearing denied*, 484 U.S. 1047 (1988); *Eastern Associated Coal Corp. v. Director, OWCP*, 220 F.3d 250, 258-259 (4th Cir. 2000) (noting the "assumption of progressivity that underlies much of the statutory regime"); *Lane Hollow Coal Co. v.*

Lockhart, 137 F.3d 799, 803 (4th Cir. 1998) (pneumoconiosis is "progressive and irreversible"). In addition, while not using the term "latent" to describe pneumoconiosis, the Fourth Circuit has acknowledged that pneumoconiosis is a "slow, progressive disease often difficult to diagnose at early stages", and it has held that medical evidence which first shows the presence of the pneumoconiosis after a miner ceases coal mine employment is relevant and must be considered. *Barnes v. Mathews*, 563 F.2d 278 279 (1977), citing *Collins v. Weinberger*, 401 F.Supp. 377 (W.D.Va. 1975). As it is well-settled law in the Fourth Circuit that pneumoconiosis is a slow, progressive and irreversible disease that may not be detectable until after a miner leaves coal mine employment and ceases coal mine dust exposure, I find that application of the new section 718.201(c) will not affect the outcome of this case.

4. 20 C.F.R. §718.204(a) (Disability and Nonpulmonary Conditions or Diseases)

This new section provides,

> (a) General. Benefits are provided under the Act for or on behalf of miners who are totally disabled due to pneumoconiosis, or who were totally disabled due to pneumoconiosis at the time of death. For purposes of this section, any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis. If, however, a nonpulmonary or nonrespiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition or disease shall be considered in determining whether the miner is or was totally disabled due to pneumoconiosis.

The Employer interprets the new rule as precluding physicians and administrative law judges from considering all relevant evidence including medical evidence relating to a claimant's non-respiratory impairments. The Employer points out that the record reflects that the Miner left the coal mining industry, at least in part, for reasons unrelated to his occupational history and that he suffered from non-respiratory conditions including diabetes mellitus, severe coronary artery disease, renal failure and mental confusion. In the Employer's view, the new rule amounts to an attempt, which is scientifically unsound and unsupported by the rule making record, to limit the medically relevant material a physician is permitted to review in rendering an opinion. The Director responds that the amendment will not affect the outcome of the case because it does nota materially change the law of the Fourth Circuit which would be applicable in the absence of the new regulations.

The first part of the new section 718.204(a), precluding consideration of a disabling non-pulmonary or non-respiratory condition or disease that is unrelated to a miner's pulmonary or respiratory disability, in determining whether a miner is totally disabled due to pneumoconiosis, is entirely consistent with Fourth Circuit precedent. *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243-244 (1994) (total disability under the Act "must be entirely respiratory in nature."). Significantly, it does not dictate what medical evidence a physician may or may not consider in forming

a medical opinion on the question of total disability, nor does it run afoul of 30 U.S.C. §923(b) (requiring consideration of all relevant evidence). Rather, it simply reflects the well-established principle that non-respiratory and non-pulmonary disabilities are "irrelevant" to establishing total respiratory or pulmonary disability. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 791 n.2 (1990).

The Employer has not argued that the second part of the new section 718.204(a), requiring consideration of non-respiratory or non-pulmonary conditions or diseases that cause a chronic respiratory or pulmonary impairment, will affect the outcome of the case, and I concur with the Director's position that the new language is consistent with Fourth Circuit law. *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 37-38 (1990) (rejecting the argument that a miner's pneumoconiosis must be totally disabling in and of itself to satisfy the Act's causation requirement and instead holding that a miner must prove that pneumoconiosis was at least a contributing cause of his totally disabling respiratory impairment).

Accordingly, I find that application of the new section 718.204(a) will not affect the outcome of this case.

5. 20 C.F.R. §718.205(c)(5) (Hastening Death Rule)

The new subsection (5) states that "[p]neumoconiosis is a 'substantially contributing cause' of a miner's death if it hastens the miner's death." The Employer states that the prior regulations never embraced the "liberal" hastened death standard. This is true. However, as the Director points out, that the hastening death standard has been universally adopted by the courts including the Fourth Circuit in *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 980 (1992), *cert. denied,* 506 U.S. 1050 (1993). Therefore, as the new subsection (5) merely incorporates the prevailing legal standard for determining whether a miner's death is due to pneumoconiosis, its application will nor affect the outcome of this case.

6. 20 C.F.R. §718.205(d) (Expedited Survivor's Claims)

The Employer contends that the amended subsection (d), which establishes expedited procedures for the processing of survivor's claims by the District Director and addresses responsibility for development of evidence, creates a new "burden shifting presumption" that was not found in the prior regulations. With the exception of minor, technical amendments, the new 718.205(d) appears unchanged from its regulatory predecessor. Moreover, the provision applies to the handling of claims before the District Director, not OALJ. Accordingly, I find that the new section 718.205(d) will have no bearing on the outcome of this case.

Based on the foregoing analysis, I conclude that application of the new regulations at issue in the NMA's lawsuit will not affect the outcome of this case. Therefore, adjudication of the instant claims on the merits is permissible under the District Court's preliminary injunction.

B. The Employer/Carrier's Motion to be Dismissed or to Exclude Director's Exhibit 186

At the hearing and again in its closing argument, the Employer objected to the inclusion of DX 186, specifically, the medical opinion of Dr. Jones, including his review of the autopsy slides, because the autopsy slides upon which Dr. Jones based his report have been lost, presumably by the District Director's office, and because repeated cooperative attempts by both parties to locate Dr. Jones have been unsuccessful.[4] The Employer argues that admission of Dr. Jones's report violates its due process rights because the pathology evidence has not been made available for review by the Employer's experts and because Dr. Jones is not available for cross-examination. I agree. The pathology slides upon which Dr. Jones based his opinions have apparently been lost, thus denying the Employer the opportunity to have an expert review them. More importantly, the apparent disappearance of Dr. Jones effectively deprives the Employer of any opportunity for cross-examination, a factor which clearly distinguishes the instant case from *Lewis v. Consolidation Coal Co.*, 15 BLR 1-37 (1991). Accordingly, on reconsideration in light of the post-hearing developments, the motion to exclude Dr. Jones's report is granted. However, the motion to be dismissed is denied as the evidentiary ruling cures any potential prejudice to the Employer and Carrier.

C. Request For Modification of the Denial of the Miner's Claim

1. Timeliness

The Employer contends that the Claimant's request to modify the denial of the Miner's claim is untimely and barred by the doctrine of *res judicata.* DX 194; Employer's Closing Argument at 10-11. However, the modification procedure has been interpreted as allowing for multiple modification requests with the only requirement being that each request be filed within one year of the denial of the preceding request. *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 497-500 (4th Cir. 1999). Here, the Claimant's modification request was timely filed within one year of June 9, 1998 when the Board denied the Miner's most recent request for modification. Accordingly, the request was timely filed, and it is not barred from consideration by the doctrine of *res judicata.*

2. The Merits

As discussed above, a party seeking modification of a prior decision must prove that there has been either (1) a change in conditions or (2) a mistake in a determination of fact. However, the sole

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[4] DX 186 includes the following medical reports in addition to the challenged report from Dr. Jones: (1) a June 21, 1996 consultation note from Douglass Green, M.D., (2) a June 21, 1996 discharge summary from the Bristol Regional Medical Center, (3) a June 19, 1996 chest x-ray report, and (4) an undated letter from Dr. Green. The Employer has not objected to these documents, and they have been admitted.

ground for modification in a case such as this where the miner is deceased is that there was a mistake in a determination of fact in the prior denial of benefits because there can be no change in the condition of a deceased miner. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). In determining whether there was a mistake in a determination of fact in the prior denial, the Supreme Court has instructed that all evidence of record should be reviewed as the fact-finder in a modification proceeding is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971).

Since the Miner's claim was filed before April 1, 1980, the applicable criteria for determining his entitlement to benefits are found in Part 727 of Title 20 of the Code of Federal Regulations. 20 C.F.R. §§ 727.200 and 718.2. Under Part 727, a miner with at least ten years of coal mine employment[5] is permitted to invoke a rebuttable presumption of total disability due to pneumoconiosis if the miner satisfies one of the medical evidentiary criteria established by section 727.203(a): (1) a chest x-ray, biopsy or autopsy establishes the existence of pneumoconiosis; (2) ventilatory studies establish the presence of a chronic respiratory or pulmonary disease which satisfies regulatory requirements as to duration and severity; (3) blood gas studies demonstrate an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values equal to or less than those specified in the regulation; (4) other medical evidence, including the documented opinion of a physician using reasoned medical judgement, establishes the presence of a totally disabling respiratory or pulmonary impairment; or (5) in the case of a deceased miner where no medical evidence is available, the affidavit of a survivor of the miner or other person with knowledge of the miner's physical condition demonstrates the presence of a totally disabling respiratory or pulmonary impairment. A claimant must establish by a preponderance of the evidence at least one of the medical criteria listed in section 727.203(a) to invoke the rebuttable presumption. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 160-161 n.35 (1987).

In the most recent decision, which involved the Miner's third request for reconsideration, Judge Jarvis first considered the Miner's newly submitted evidence to determine whether the Miner had established a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §727.203(a)(1)-(4). He found that the newly submitted x-ray readings were all negative for pneumoconiosis and, therefore, did not invoke the presumption under section 727.203(a)(1), and he found that no new pulmonary function studies or arterial blood gas tests were submitted to invoke the presumption under section 727.203(a)(2) or (3). Judge Jarvis further found that the only newly submitted medical opinion to mention coal worker's pneumoconiosis was a May 20, 1996 opinion from Dr. Green. However, Judge Jarvis found that Dr. Green's opinion did not invoke the presumption

[5] Judge Schellenberg found that the Miner had established 26 plus years of coal mine employment, DX 48 at 2, and the Employer conceded this finding in its response to the Miner's petition for review to the Board. DX 51 at 1.

under section 727.203(a)(4) because the doctor did not conclude that the Miner had a totally disabling respiratory or pulmonary impairment. DX 161 at 10.

Pursuant to the Board's holding in *Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981) that a claim which fails under the Part 727 regulations must also be considered under 20 C.F.R. Part 410, Judge Jarvis next considered whether the Miner had established a change in conditions or mistake of fact under Part 410 which requires that a claimant establish, by a preponderance of the evidence, that the miner: (1) suffers from pneumoconiosis; (2) that the pneumoconiosis arose out of coal mine employment; (3) that the miner is totally disabled; and (4) that the total disability is due to pneumoconiosis. 20 C.F.R. §410.410(b). Regarding the existence of pneumoconiosis, Judge Jarvis found that the weight of the x-ray evidence was negative for pneumoconiosis as the only positive readings in the record were made by a physician who is neither a B-reader nor a board-certified radiologist, while the B-readers and board-certified radiologists who did read the x-rays found them to be negative for pneumoconiosis. Since the record did not contain any autopsy or biopsy evidence of pneumoconiosis, Judge Jarvis concluded that the Miner had not established pneumoconiosis under 20 C.F.R. §410.414(a). Judge Jarvis also found that the Miner had failed to establish the presence of pneumoconiosis by invocation of the section 410.414(b) presumption because the evidence did not demonstrate the existence of a totally disabling chronic respiratory or pulmonary impairment. In this regard, Judge Jarvis found that there was no mistake in Judge Malamphy's prior determination that the opinions of Drs. M.J. Thakur and J.P. Sutherland, Jr. were insufficient to establish total disability, and he gave greater weight to the opinions from Drs. Fino and Castle, both of whom are board-certified in internal and pulmonary medicine, that the Miner did not have a respiratory or pulmonary impairment. Since there were no valid pulmonary function studies or arterial blood gas tests producing values which qualified under the regulatory criteria to establish total respiratory disability, Judge Jarvis concluded that pneumoconiosis had not been established under section 410.414(b). Finally, Judge Jarvis found that pneumoconiosis was not established under section 410.414(c) because the record did not contain any other relevant evidence establishing the existence of a totally disabling chronic respiratory or pulmonary impairment arising out of coal mine employment. Accordingly, he concluded that the Miner had not established entitlement pursuant to Part 410. *Id.* at 11.

The newly submitted medical evidence begins with records from Dr. Patel which show that the Miner was admitted to the Buchanan General Hospital in Grundy, Virginia with a chief complaint of an episode of unresponsiveness and elevated blood pressure. DX 177. At that time, a physical examination of the Miner's lungs showed good bilateral air entry, no adventitious sounds and adequate chest excursion. *Id*. at 5. The Miner was discharged in improved condition on June 8, 1996 with a final diagnosis of (1) syncope, possibly secondary to transient ischemic attack, (2) carotid atherosclerosis, and (3) accelerated hypertension with secondary diagnoses of (1) insulin-dependent diabetes mellitus with diabetic complications, (2) end stage renal disease on peritoneal dialysis, (3) atherosclerotic heart disease status post coronary artery bypass graft, and (4) anemia secondary to renal disease. *Id*. at 6. These records do not contain any diagnosis of lung disease including coal worker's pneumoconiosis.

Records from the Bristol Regional Medical Center in Bristol, Tennessee indicate that the Miner was admitted to that facility on June 19, 1996 with a chief complaint of mental status change, for which he was seen by Donald Quinn, M.D. and Douglass Green, M.D. DX 186. The Miner was discharged with his mental status resolved on June 21, 1996 at which time Dr. Quinn listed his diagnosis as (1) dementia, (2) chronic renal failure, (3) insulin-dependent diabetes mellitus, (4) hypertension, (5) coronary artery disease, and (6) congestive heart failure. *Id.* at 13.
There records contain no diagnosis of lung disease or coal worker's pneumoconiosis.

The Claimant also submitted an undated letter which she received on August 12, 1996 from Dr. Green. In this letter Dr. Green stated that the Miner's multiple medical problems included multi-infarct dementia with impaired memory, an inability to tolerate the emotional stress of a new environment, a change to peritoneal dialysis because of an inability to tolerate transportation to the hemodialysis center secondary to severe congestive heart failure, lung disease, hypoxia, and angina. DX 186 at 19. Dr. Green did not discuss the etiology or severity of the Miner's lung disease.

The records from the Bristol Regional Medical Center reflect that the Miner was readmitted under the care of Dr. Quinn on April 14, 1997 with a chief complaint of decreased mental status. DX 178. The Miner did not recover and expired at the hospital on April 27, 1997. Dr. Quinn reported in his discharge summary that the Miner had been admitted with decreased mental status and that he subsequently became unresponsive with significant pulmonary edema. Dr. Quinn also reported that the Miner developed increased body temperature and was diagnosed with possible meningitis. Dr. Quinn further noted that the Miner's hemodynamics slipped away despite hemodialysis and antibiotic intervention, and he stated that it "appeared that the patient's underlying coronary vascular disease, chronic renal failure and diabetes made him such a fragile host, that he never did recover." *Id*. at 5. Dr. Quinn's discharge diagnosis was: (1) end stage chronic renal failure; (2) possible meningitis, etiology unclear; (3) end stage diabetes mellitus with peripheral vascular disease, including arteriosclerotic coronary artery disease, status post bypass grafting; (4) history of transient ischemic attack versus dementia; (5) history of intermittent atrial fibrillation; and (6) probable black lung with history of same; and he noted that the Claimant had requested an autopsy for purposes of determining the presence of black lung. *Id*. at 5-6. Dr. Quinn also completed the Miner's death certificate on which he listed "C.R.F." (chronic renal failure) as the immediate cause of death. DX 174. No underlying or contributing causes were listed.

An autopsy was completed by pathologist Joan C. Coogan, M.D. on May 2, 1997. DX 175. On microscopic examination of the sections of lung tissue, Dr. Coogan reported finding "rare, predominantly pleural dust macules" with "no associated fibrosis either in association with the dust deposits or in the surrounding alveolar pulmonary parenchyma." *Id*. at 2. She also reported,

> The right hilar lymph nodes show an ill-defined irregular area of coalescent hyalinization associated with coal dust deposition. This fibroanthrasilicotic macule is consistent with that usually seen in coal worker's pneumoconiosis. There is no evidence of caseation

> or palisading histiocytes. The remaining right lymph nodes and the left lymph nodes show no similar changes. They are benign and anthracotic.

Id. Dr. Coogan's final pathologic diagnosis (limited to black lung examination) was: (1) rare pulmonary dust macule consistent with simple coal worker's pneumoconiosis without fibrosis; (2) solitary fibrosing anthrasilicotic macule, right pulmonary hilar lymph node; (3) cardiomegaly (900 grams) with bi-atrial and bi-ventricular dilation and hypertrophy; (4) severe coronary artery disease, status post bypass surgery; and (5) bilateral pleural adhesions. *Id*. at 1.

The OWCP had the autopsy slides, Dr. Coogan's autopsy report and the Miner's records from the Bristol Regional Medical Center reviewed by Richard L. Naeye, M.D., a professor of pathology at the Pennsylvania State University College of Medicine. Dr. Naeye stated that some but not all of the slides of lung tissue had scattered small deposits of black pigment, but he concluded that these deposits were too small (*i.e*., less than one mm. in diameter) to be classified as anthracotic micronodules. He reported that no tiny bifringent crystals or fibrous tissue was admixed with the black pigment and that, in the few spots where fibrous tissue was associated with black pigment, the fibrous tissue extended far beyond the black pigment, indicating that the relationship between the two is one of association rather than one of cause and effect. Dr. Naeye concluded that coal worker's pneumoconiosis was not present in the Miner's lungs since there were no anthracotic micronodules or macronodules and because there was no etiological connection between the minimal black pigment in the Miner's lungs and the more extensive fibrosis. He further concluded that coal worker's pneumoconiosis could not have caused any impairment in the Miner's lungs and played no role in his death. DX 176.

The OWCP also obtained re-readings from M. Lippmann, M.D., a B-reader, of three chest x-rays taken during the Miner's terminal hospitalization in April 1997. All of Dr. Lippmann's re-readings were negative for the presence of pneumoconiosis. DX 180-182.

The Employer submitted a report from Gregory J. Fino, M.D. who reviewed the Miner's medical records including the autopsy report and the consultative pathology reports from Drs. Naeye and Jones. EX 1. Dr. Fino stated that there was no clinical evidence of coal worker's pneumoconiosis; however, based on the pathology findings of Drs. Coogan and Jones, he assumed that the Miner had coal worker's pneumoconiosis. However, he stated that there was no change in the Miner's pulmonary condition, noting that he had normal blood oxygen in 1995 and that his low blood oxygen levels after that time were consistent with his severe kidney and heart disease and unrelated to coal worker's pneumoconiosis. He further stated that the Miner was disabled by the severe kidney and heart disease and that there was no evidence that the Miner's lung condition deteriorated, even though his general health had declined. Finally, Dr. Fino concluded that the Miner's death was due to severe heart and kidney disease, that coal worker's pneumoconiosis played no role in his death and that his death was not caused by complications of coal worker's pneumoconiosis. *Id*. at 11. Dr. Fino reiterated these opinions at a deposition taken on February 2, 2000. EX 5. Dr. Fino is a certified B-reader, and he is board-certified in internal medicine with a subspecialty in pulmonary disease. EX 2.

The Employer also submitted a consultative report from James R. Castle, M.D. EX 3. Dr. Castle reviewed the medical evidence and concluded that the Miner's condition did deteriorate since the previous denial of his claim for black lung benefits. However, he stated that this deterioration was not, in whole or in part, due to coal worker's pneumoconiosis or coal mine dust exposure, but rather was attributable to the Miner's severe atherosclerotic coronary artery disease, cerebrovascular disease and diabetes mellitus with resultant complications or retinopathy, neuropathy and nephropathy. *Id.* at 11. Dr. Castle stated that it was his opinion with a reasonable degree of medical certainty that the Miner "possibly" had coal worker's pneumoconiosis based on the opinions of Drs. Coogan and Naeye. He gave no credence to the report from Dr. Jones, noting numerous inconsistencies and conflicts between Dr. Jones's pathological findings and conclusions. *Id.* at 11-12. Dr. Castle concluded that the medical evidence clearly indicates that the Miner died as a result of complications of chronic renal failure and diabetes mellitus complicated by very severe coronary artery disease with resultant congestive heart failure. He further concluded from his review of the medical evidence that the Miner did not have any significant pulmonary impairment, and he stated that it was his opinion within a reasonable degree of medical certainty that even assuming that the Miner did have coal worker's pneumoconiosis, there was no impairment related to that process because of its extremely minimal nature and severity. Dr. Castle stated that the Miner was totally and permanently disabled as a result of his severe illnesses, but he added that the objective evidence showed that the Miner did not have any significant respiratory impairment or disability arising from his coal mine employment. *Id.* at 13. In conclusion, Dr. Castle stated that the Miner died as a result of chronic renal failure due to diabetic nephropathy and complicated by diabetes mellitus with cerebrovascular disease, multi-infarct dementia, congestive heart failure, coronary artery disease and anemia, and he stated that his death was not caused by, contributed to or hastened in any way by any possible pneumoconiosis that may have been present. *Id.* at 13-14. Dr. Castle's *curriculum vitae* indicates that he is Co-Director of Respiratory Therapy Services at the Community Hospital of Roanoke Valley in Roanoke, Virginia. He is board-certified in internal medicine and pulmonary diseases, and he is a certified B-reader. He has also published several articles and given numerous presentations on diagnosis and treatment of lung disease. EX 4.

Based on my review of the record, I find that the Claimant has established that there was a mistake in the prior determination under Part 727 that the Miner had not met his burden of establishing any one of the four medical prerequisites to invocation of section 727.203(a)'s rebuttable presumption of total disability due to pneumoconiosis. Significantly, the record now contains Dr. Coogan's finding at autopsy that the coal worker's pneumoconiosis was present in the Miner's lungs. Autopsy findings are entitled to greater weight than x-ray evidence because an autopsy is the most reliable category of evidence for determining the presence of the disease. *See Terlip v. Director, OWCP*, 8 BLR 1-363, 1-364 (1985). I recognize that Dr. Naeye presented a contrary opinion to the OWCP which, as Dr. Castle points out in his thorough assessment of the medical records, makes it difficult to determine with absolute certainty whether the Miner suffered from pneumoconiosis. However, the Claimant need only establish the presence of pneumoconiosis by a preponderance of the evidence at section 727.203(a)(1), and I conclude that Dr. Coogan's diagnosis of simple coal worker's pneumoconiosis is

not, on balance, outweighed by Dr. Naeye's opinion. In particular, I am persuaded that Dr. Naeye's technical discussion of whether the deposits of black pigment are too small to be classifiable as anthracotic micronodules or macronodules does not negate Dr. Coogan's finding of a pulmonary dust macules consistent with pneumoconiosis. *Cf. Barber v. Director, OWCP,* 43 F.3d 899, 900-901 (4th Cir.1995) (noting the autopsy finding of "no typical coal-worker's macules" did not defeat claim.). Accordingly, I find the Claimant has successfully invoked the rebuttable presumption of total disability due to pneumoconiosis based on a preponderance of the evidence at section 727.203(a)(1).

Once a claimant has invoked the section 727.203(a) presumption, a party opposing entitlement has the burden producing evidence sufficient to establish rebuttal by one of the methods listed in section 727.203(b): (1) the evidence establishes that the miner is doing his usual coal mine work or other comparable and gainful work; (2) in light of all relevant evidence it is established that the miner is able to perform his usual coal mine work or other comparable and gainful work; (3) the evidence establishes that the total disability or death of the miner did not arise in whole or in part from coal mine employment; or (4) the evidence establishes that the miner does or did not have pneumoconiosis. *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939 (4th Cir. 1980) (case involving similar presumptions and rebuttal under the Part 410 regulations); *Burt v. Director, OWCP,* 7 BLR 1-197, 1-198 (1984). The Employer has not come forward with any evidence that the Miner was doing his usual coal mine work or comparable work prior to his death, or that he was capable of performing such work, and the Employer can not prove that the Miner did not have pneumoconiosis in view of my finding at section 727.203(a)(1) that existence of the disease has been established by a preponderance of the evidence. Therefore, the Employer is unable to establish rebuttal pursuant to either section 727.203(b)(1), (2) or (4). However, the Employer has produced evidence that the Miner's total disability was unrelated to his coal mine employment which must be weighed at section 727.203(b)(3). To establish rebuttal at section 727.203(b)(3), an employer must "rule out the *causal* relationship between the miner's total disability and his coal mine employment." *Bethlehem Mines Corp. v. Massey,* 736 F.2d 120, 123 (4th Cir.1984). The causal connection may be ruled out for rebuttal purposes by a showing "*either* that the miner has no respiratory or pulmonary impairment of any kind, *or* that such impairment was not caused in whole or in part by his coal mine employment." *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 185 (4th Cir. 1999) (italics in original; citations omitted). Based on my review of the medical evidence of record, I find that the Employer has made the requisite showing that any respiratory of pulmonary impairment that the Miner might have suffered prior to his death was not caused in whole or in part by his coal mine employment. While Dr. Green has attributed the Miner's shortness of breath in part to his coal mine employment, DX 160 at 3 (stating that the Miner has "chronic dyspnea on exertion/shortness of breath which is multifactorial in origin including a long history of working in the mines (coal worker's pneumoconiosis), congestive heart failure, renal failure, etc."), none of the more recent hospital records contain any diagnosis of lung disease or any mention of respiratory or pulmonary impairment due to any cause. Indeed, the only mention of any possible respiratory or pulmonary condition found in the substantial volume of new evidence is Dr. Green's brief and unexplained reference to "lung disease" in his undated letter to the Claimant. DX 186 at 19. Moreover, I fully agree with Judge Jarvis's conclusion that Dr. Castle has more persuasively, and with better support in the underlying objective medical evidence, explained that the Miner's symptoms of exertional dyspnea and shortness of breath were not respiratory or pulmonary in nature but rather were related to the Miner's severe

atherosclerotic coronary artery disease, cerebrovascular disease and diabetes mellitus with resultant complications or retinopathy, neuropathy and nephropathy.

Based on the foregoing, I conclude that the Employer has established rebuttal at section 727.203(b)(3) by a preponderance of the evidence. Because the evidence does not support a finding that the Miner was totally disabled due to pneumoconiosis, I additionally conclude that the Claimant has not shown that there was any mistake of fact in the prior determination that the Miner had not alternatively established entitlement under Part 410. Consequently, the Claimant's request for modification of the prior denial of the Miner's claim for benefits is denied.

D. The Request for Modification of the Denial of Survivor's Benefits

Since the Claimant's application was filed after the 1982 amendments to the Act became effective on January 1, 1982, survivor's benefits can only be awarded to the Claimant on the basis of proof that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.1(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87 (1993). Section 718.205(c) of the Regulations provides that for the purpose of adjudicating survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria is met: (1) competent medical evidence establishes that the miner's death was caused by pneumoconiosis; (2) pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis; or (3) where the presumption set forth at section 718.304, which requires x-ray evidence of one or more large opacities (*i.e.*, greater than one cm in diameter) or biopsy, autopsy or other evidence of "massive" lesions in the lung, is applicable. Section 718.205(c)(4) further provides that survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death. As discussed above, the new rules at section 718.205(c)(5) adopt the rule that pneumoconiosis is a "substantially contributing" cause of death within the meaning of section 718.205(c)(2) and (4) if it "hastens" the miner's. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 979-80 (4th Cir. 1992), cert. denied, 506 U.S. 1050 (1993).

The Claimant is unable to establish death due to pneumoconiosis pursuant to section 718.205(c)(1) or (3) because there is no evidence that the Miner's death was caused by pneumoconiosis, and there is no evidence to satisfy the medical criteria for invoking the section 718.304 presumption of death due to pneumoconiosis. There is also no evidence in the record, aside from the excluded report from Dr. Jones, that the Miner's death was in any way hastened by pneumoconiosis. Moreover, even if Dr. Jones's report were not excluded, I would accord it little weight due to the many inconsistencies and internal conflicts correctly identified by Dr. Castle, and I would conclude that it is convincingly outweighed by the credible and probative evidence of record, including the contrary opinions from Drs. Naeye, Castle and Fino.

Having determined that the Claimant has not met her burden of establishing by a preponderance of the evidence that the Miner's death was due to pneumoconiosis, I find that she has not shown that there was a mistake of fact in the prior denial of her claim for survivor's benefits. Accordingly, her request for modification must be denied.

III. Order

The requests for modification of the prior denials of living miner's claim filed by Virgil Bailey on May 13, 1976 and the survivor's claim filed by Ernestine Bailey on October 1, 1997 are **DENIED**.

A

Daniel F. Sutton

Administrative Law Judge

Camden, New Jersey

NOTICE OF APPEAL RIGHTS

Pursuant to 20 C.F.R. §725.481, any party dissatisfied with this Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board, ATTN: Clerk of the Board, P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor for Black Lung Benefits, Francis Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, DC 20210.

ATTORNEY'S FEES

The award of an attorney's fee is permitted only in cases in which a claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to a claimant for representation services rendered in pursuit of the claim.